

KEEPING THE COMPACT CLAUSE IRRELEVANT

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I want to say a few words, some sounding in law and some sounding in policy, about why I think the Compact Clause should continue to be, as it has always been, ignored by all relevant constitutional actors. That is not to say we should not acknowledge the Compact Clause is in the Constitution, but we should treat that Clause as a nonjusticiable part of the Constitution, much like the Guarantee Clause of Article IV is treated. I will go even further to argue that the Compact Clause should be understood to announce truisms that are unlikely to ever affect policymaking, because everyone agrees on them and rarely, if ever, violates them.¹

Let's start with non-justiciability. As you know, the Constitution guarantees to each state a republican form of government, and, as you also know, the United States is supposed to enforce that provision.² Yet, this duty has always been regarded as nonjusticiable.³ It

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1. See JOHN R. KOZA, ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 239 (2013) ("[W]e have been unable to locate a single case where a court invalidated a compact for lack of consent on the grounds that it impermissibly encroached on federal supremacy.").

2. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

3. See *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79–80 (1930) ("As to the guaranty of every State of a republican form of government (section 4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of Congress and not the courts.").

has never been directly enforced by anyone, not even Congress.⁴ And that is just as well. Everyone agrees that government should be “republican” in a very general sense of being accountable to the public. It probably serves no one’s interests to constitutionalize our disagreements about the best mechanisms for ensuring such accountability by having judges or politicians invoke the Guarantee Clause. These disagreements are best treated as matters of negotiable policy, not constitutional principle.

Exactly the same considerations should apply to the Compact Clause. I have some legalistic reasons why I think it is perfectly reasonable to construe the Compact Clause as being nonjusticiable and having very narrow scope, but my main reasons will sound in policy. The legalistic reasons will sound in the usual modalities of constitutional interpretation: text, original understanding, and precedent. The policy reasons will sound in terms of the costs and benefits of using constitutional doctrines to constrain subnational policymaking.

On the legalistic reasons, let us start with the text. The text refers to compacts or contracts. It is a reasonable reading of these words to argue that mere coordination among states does not amount to a compact or contract unless such coordination is accompanied by some sort of an enforcement mechanism such as adjudication under international or contract law before some tribunal like the Supreme Court sitting in original jurisdiction.

Without that enforcement mechanism, it is perfectly reasonable to say that states coordinating with each other simply amounts to coordination, not a compact. On this reading, any agreement among states would fall outside the Compact Clause just so long as the agreement did not provide for any binding mechanism for resolving disputes. This reading is actually a narrower view of the Compact Clause than that which has been taken by the U.S. Supreme Court, but my reading produces practically the same out-

4. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 878 (1994) (arguing that Guaranty Clause ought to be justiciable because of “the great improbability of congressional action”).

comes: both the Supreme Court's doctrine and my narrower reading ensure that the Clause will never be enforced, which is a good thing.⁵

You might well ask: "Why is that a good thing? Are we not defying the original understanding of the Constitution?" This question brings me to my second legalistic reason for not enforcing the Compact Clause: that Clause was intended to address problems that no longer exist.⁶ The Compact Clause was added as an afterthought to address the worries expressed in *The Federalist No. 5*, one of the few essays by John Jay, an underestimated writer of the Publius trio.⁷ Jay warns in *The Federalist No. 5* about the danger that the states will break into confederations that will ally themselves to a foreign power.⁸ Because we do not want the United States to become disunited by such alliances, Jay urges, we should ratify this Constitution that will reduce states' incentives to ally with foreign powers.⁹

This fear that different regions might ally with foreign powers was, indeed, a big worry in the 1780s and 1790s.¹⁰ The United States was militarily weak, access to the Mississippi was difficult, and failure of union, or a weak union under the Articles of Confederation, would naturally invite each state to fend for itself by making immediate alliances with a few of its neighbors.¹¹

5. See KOZA, *supra* note 1, at 239.

6. See James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 784–85 (2019).

7. Cf. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925).

8. See THE FEDERALIST NO. 5, at 47 (John Jay) (Clinton Rossiter ed., 2003) ("[E]ach of [the states] should be more desirous to guard against the others, by aid of foreign alliances, than to guard against foreign dangers by alliances between themselves.").

9. *Id.*

10. See, e.g., MURRAY N. ROTHBARD, *THE NEW REPUBLIC, 1784–1791*, at 101, 104 (2019) (explaining the concern that those in the West would ally with Spain to secure navigation of the Mississippi River); Matthew Spalding, *America's Founders and the Principles of Foreign Policy: Sovereign Independence, National Interests, and the Cause of Liberty in the World*, THE HERITAGE FOUND. (Oct. 15, 2010), <https://www.heritage.org/political-process/report/americas-founders-and-the-principles-foreign-policy-sovereign-independence> [https://perma.cc/X8XJ-DMP9].

11. See ROTHBARD, *supra* note 10, at 98; see also THE FEDERALIST NO. 5, *supra* note 8.

The primary practical worry focused on the danger that Westerners would make an alliance with Spain to get access to the Mississippi River.¹² John Jay had negotiated the Jay-Gardoqui Treaty in 1786 to ensure American rights to trade with the Spanish, but that treaty did not give Americans the right to navigate the Mississippi, so it was rejected by the Continental Congress.¹³ The Westerners worried that Eastern politicians like Jay would ignore their interests in shipping goods to New Orleans on the Mississippi, a worry that encouraged Westerners to seek out help from foreign powers to protect their interests.¹⁴ The eighteenth century saw miscellaneous conspiracies between Westerners (or people purporting to represent their interests) to form alliances with European powers to secure land or navigation rights especially valued in the West.¹⁵ William Blount, for instance, was expelled from the U.S. Senate in 1797 for one such very odd and improbable plot to ally with Great Britain in order to invade Florida with the aid of Tennesseans backed by Cherokee and Creek Indians.¹⁶

The original purpose of the Compact Clause, in short, was to prevent states from entering into military alliances with foreign powers.¹⁷ This purpose is suggested by its placement among other forbidden powers in Article I, section 10 of the Constitution, all of which focus on war and diplomacy, such as powers to make war, maintain naval ships, and enter into treaties with foreign powers.¹⁸

12. See ROTHBARD, *supra* note 10, at 101, 104.

13. *Id.* at 99.

14. *Id.* at 100–02.

15. See, e.g., Michael Allen, *The Mississippi River Debate, 1785-1787*, 36 TENN. HIST. Q. 447, 452 (1977) (“But the Spanish were fortunate enough to have retained some American allies on the Southwestern question.”); Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117, 119 (1991) (addressing a conspiracy led by General James Wilkinson to secede the Mississippi Valley from the United States under the protection of Spain).

16. *Blount Expulsion*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/expulsion_cases/Blount_expulsion.htm [<https://perma.cc/UA87-X44R>].

17. See Blumstein & Cheeseman, *supra* note 6, at 785.

18. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in war, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

The Compact Clause, read in light of this surrounding text, is about states acting as sovereign nations by making alliances with each other and other nations.

That original worry mostly evaporates with the ratification of the Constitution in 1788. It lingers on in various improbable schemes following ratification, ranging from William Blount's scheme to conquer Florida with Great Britain's assistance to the 1814 Hartford Convention of Federalist New Englanders who sought to make a separate peace with Great Britain to end the trade-killing War of 1812.¹⁹ After Andrew Jackson won the Battle of New Orleans, the Federalists of New England were deeply embarrassed by their efforts at diplomacy.²⁰ Since then, no one has worried about a bunch of states forming a confederation or an alliance with a foreign power.

A plausibly narrow reading of constitutional text, in short, is supported by a narrow historical purpose: the Compact Clause was added to deal with a problem that quickly became obsolete. The Clause itself, therefore, can be ignored without violating the spirit or letter of the Constitution. There is no reason why one should invent new problems for such text to address just to ensure that the Clause has some work to do. Unemployed constitutional text is not like an unemployed worker who needs a job to safeguard its dignity. In particular, I do not see a word or a breath in the eighteenth century, described by Professor Michael Greve, that sub-groups of states must be stopped from forming cartels that will inefficiently restrict the supply of goods and services or beat up on other states.²¹ That just was not a worry that I see anywhere in the documentary history of the ratification of the Constitution. To the extent that any worries were expressed that are relevant to the Compact Clause, they were about alliances with foreign powers that today would be

19. See Mark Janis, *The Hartford Convention and the Specter of Secession*, UNIV. OF CONN. (Dec. 15, 2014), <https://today.uconn.edu/2014/12/the-hartford-convention-and-the-specter-of-secession> [<https://perma.cc/T9ZP-J6EV>].

20. *Id.*

21. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 325–26 (2003).

treasonous.²² I do not see any eighteenth century reason why we should take this Clause seriously today, when the dangers of such treason are now nil.

Beyond these considerations of text and original purpose, judicial precedent also suggests a narrow reading of the Compact Clause. The Clause has never been taken seriously by the U.S. Supreme Court because taking it literally invites absurdity and taking it less than literally invites judicial legislation. As Justice Field said in *Virginia v. Tennessee*,²³ “it would be the height of absurdity” to say that every conceivable contract between state governments constitutes a compact or contract within the meaning of Article I, section 10.²⁴ Justice Field cited interstate agreements to control “pestilence” as examples of the sort of agreement that should not need congressional ratification.²⁵

But there were other sorts of bargains for which congressional ratification seems unnecessary. In the early twentieth century, states were litigating against each other’s citizens to control interstate pollution, invoking the original jurisdiction of the Supreme Court.²⁶ For instance, Georgia sued a Tennessee copper refining company to control pollution from acid rain caused by copper smelting.²⁷ In *Georgia v. Tennessee Copper Company*, Justice Holmes held that the U.S. Supreme Court could grant Georgia an injunction against this kind of pollution.²⁸ Much later, the Supreme Court held

22. Blumstein & Cheeseman, *supra* note 6, at 784–85.

23. 148 U.S. 503 (1893).

24. *Id.* at 518.

25. *Id.* (“[I]t would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms ‘compact’ or ‘agreement’ in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?”)

26. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 218 (1901) (pertaining to the seeking of an injunction to restrain the defendants from discharging sewage into an artificial channel).

27. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1906).

28. *Id.* at 239.

that the federal courts could use their power to decide cases arising under federal law to fashion a common law of public nuisance for resolving disputes between a state (Illinois) and a subdivision of a state (Milwaukee).²⁹

This sort of litigation over interstate nuisances could easily involve two states. Presumably, the parties to such litigation, whether public or private, ought to have the power to enter into settlements of their lawsuits. But would one argue that each such consent decree must be ratified by Congress? If not, then how does a court distinguish those that require congressional consent and those that do not? Quite apart from torts, states are constantly making contracts, often with each other. The University of Michigan might make a deal with the University of Ohio to arrange a football game. Are we really going to say that such an agreement has to go to Congress? Of course not. That would be, as Justice Fields said, “the height of absurdity.” But as soon as one realizes that states are simply corporations that must make dozens of deals, many of which will be with cities and states, drawing a line between the bad compacts and the good compacts leads one down a path of chaos.

The Supreme Court has never taken seriously the task of separating the contracts that fall within and outside Article I, section 10. The Court in *United States Steel Corp. v. Multistate Tax Commission*³⁰ held that these compacts never violate the Compact Clause unless they interfere in some special, unspecified, mystical way with the United States’ “just supremacy.”³¹ Nobody quite knows what that phrase means, and I would just as soon not find out.³²

In sum, the Court has never, ever enforced the Compact Clause. So as a matter of precedent, in addition to original understanding and text, it makes sense for the Compact Clause to stay interred.

29. *Illinois v. City of Milwaukee*, 406 U.S. 91, 91–92 (1972).

30. 434 U.S. 452 (1978).

31. *Id.* at 468 (quoting *Virginia*, 148 U.S. at 519); see also Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 764 (2010) (stating that in each case the federal supremacy test has applied, the Supreme Court did not find encroachment to require congressional review or Congress had already approved the agreement).

32. See Hollis, *supra* note 31, at 765 (“Exactly when the Court will find an interstate agreement requires congressional consent thus remains an open question.”).

What about policy? Consider three policy reasons for not reviving the Compact Clause from its dignified coma, two concerning alternative mechanisms for dealing with undesirable interstate compacts and one relating to the cost of getting rid of them.

Professor Greve is right that, in theory, an interstate compact could lead a group of states to impose costs on other states.³³ But do we need the Compact Clause to protect us from these costs? I am skeptical for two reasons.

First, the Executive Branch, through its agencies, has more than enough resources to act quickly and expeditiously to get rid of state compacts that it believes interfere with any federal policy embodied in a statute.³⁴ There are a lot of federal statutes out there, ranging from the Clean Air Act and the Clean Water Act to the federal regulation of motor carriers. If the President believes that some group of states are somehow undermining an actual federal policy contained in one of these statutes, then he or she can instruct the Department of Justice to bring a lawsuit enforcing the supremacy of federal law.

Second, if the President does not act, the Supreme Court can act under a bevy of doctrines that enforce unwritten, made-up judicial principles of nationalism, like the dormant commerce clause or *Zschernig's* and *Garamendi's* Foreign Policy Dormant Clause.³⁵ And the Court has on occasion invoked these doctrines to prevent, for instance, California from creating its own Holocaust compensation system that seemed inconsistent with the compensation system that

33. Greve, *supra* note 21, at 294.

34. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688 (2014) (arguing that the Take Care Clause of the Constitution requires the President to enforce enacted federal law but that the executive retains "some independent executive authority to assess whether and to what degree any given law applies in any given factual circumstance").

35. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1630–31 (1997) (These decisions "draw their 'inspiration and authority' from constitutional structure, they have a content that is based on independent discretionary policy judgments by courts, and they can be overturned by legislation rather than by constitutional amendment."); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (emphasizing the role of constitutional common law in the development of courts' understanding of various constitutional doctrines).

had been negotiated by President Clinton with Germany in the 1990s.³⁶

So, given that both the Court and the President can act quickly to protect national supremacy, I really do not see why we need this extra Compact Clause backstop to say states need to queue up before Congress to get compacts approved.

I especially do not think that the removal of the Compact Clause presents a notable danger in the context of our current political climate. Aside from the safeguard of the presidency and aside from the safeguard of the Court, the costs of subnational inaction could be higher than the costs of too much action in an age of polarization. Put another way, false negatives (state compacts that ought to be invalidated but are not) might be less dangerous than false positives (state compacts that are struck down but ought to be upheld).

Right now, we are living through a time in which the federal government is essentially mired in gridlock. I cast no aspersions on any party or region of the nation, red or blue, in recognizing the existence of this national paralysis. Whatever the reasons, the simple fact that the Congress cannot easily act to address pressing national problems, ranging from COVID-19 to police brutality, means that, if any governmental response is to be had, it must come from the states. But there is no reason why we should prefer uncoordinated state responses to coordinated ones. True, as Professor Greve notes, the latter can be protectionist, but so too can the former.³⁷ The notion that gridlock is so desirable that we should inflict the paralysis of the central government on the state governments seems improbable. A strict Compact Clause doctrine, however, threatens to export the gridlock of the national government into the states' regulatory processes. Any time that you queue up a compact before Congress, you can expect that for reasons utterly unrelated to the merits at issue, nothing will happen.³⁸ And nothing is no longer acceptable in a world in which we need policy making to emerge from

36. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 412–15 (2003).

37. Greve, *supra* note 21, at 317.

38. See Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 533–34 (2009) (“These built-in impediments put

some level of government.

So, it seems to me that we should simply switch the default rule. If Congress and the President, the President alone, or the Court alone thinks that what the states are doing is undermining foreign policy or some important national policy, then let them intervene to make a case for implied preemption under either statutory or constitutional policy.

But coordination among the states that is not enforceable through any form of binding litigation should never be an additional reason to strike down what the states have done merely because the device through which such coordination is achieved might count as a compact under Article I, section 10.

a 'thumb on the scale' against congressional action: doing nothing is always easier than passing a piece of legislation.").